

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HD SUPPLY FACILITIES MAINTENANCE, LTD.,

Plaintiff,

LEIF BYMOEN, an individual, and AZ PARTSMASTER, INC., an Arizona Corporation,

Defendants.

2:07-CV-00853-PMP-LRL

ORDER

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure, this Court certifies to the Nevada Supreme Court the following three questions of law that may be determinative of matters before this Court and as to which there is no clearly controlling precedent in the decisions of the Nevada Supreme Court:

1. Whether the Nevada rule stated in Traffic Control Services, Inc. v. United Rentals Northwest, Inc., 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004), that “absent an agreement negotiated at arm’s length, which explicitly permits assignment and which is supported by separate consideration, employee non-competition covenants are not assignable,” applies when a successor corporation acquires a non-competition covenant as a result of a merger?

2. Whether the Nevada rule stated in Traffic Control that “absent an agreement negotiated at arm’s length, which explicitly permits assignment and which is supported by separate consideration, employee non-competition covenants are not assignable,” applies

1 when a successor corporation acquires a non-solicitation covenant as a result of a merger?

2 3. Whether the Nevada rule stated in Traffic Control that “absent an agreement
3 negotiated at arm’s length, which explicitly permits assignment and which is supported by
4 separate consideration, employee non-competition covenants are not assignable,” applies
5 when a successor corporation acquires a confidentiality covenant as a result of a merger?

6 **I. BACKGROUND**

7 Plaintiff HD Supply Facilities Maintenance, Ltd. (“HD Supply”) is “one of the
8 largest and most established maintenance, repair and operations (“MRO”) supplies product
9 distribution firms in the United States.” (Compl. [Doc. #1] at 3.) Plaintiff is the successor
10 in interest to Hughes Supply, Inc. and Century Maintenance Supply, Inc. (“Century”) after a
11 series of mergers. (Id. at 3.)

12 Century hired Defendant Leif Bymoen (“Bymoen”) in April 1997 as a sales
13 representative in Nevada. (Id. at 4.) While employed by Century, Bymoen executed a
14 Confidentiality and Non-Competition Agreement (“Agreement”). (Id., Ex. A.) The
15 Agreement prohibited Bymoen from disclosing confidential, trade secret, or proprietary
16 information. (Id., Ex. A at 1.) The Agreement also included a six month covenant not to
17 compete within the market area and a six month prohibition on Bymoen soliciting Century
18 customers with whom Bymoen became acquainted while employed at Century. (Id.) The
19 Agreement was silent on assignability.

20 Bymoen continued to work for Century and its successors interest, Hughes
21 Supply, Inc. and HD Supply, until September 2006, when Bymoen left HD Supply and took
22 a sales representative position with a competitor, Defendant AZ Partsmaster, Inc. (“AZP”).
23 (Id. at 7.) Plaintiff HD Supply brought suit in June 2007, alleging breach of contract,
24 misappropriation of trade secrets, tortious interference with contractual relations, and
25 breach of fiduciary duty. Plaintiff HD Supply seeks damages, injunctive relief, and
26 attorneys’ fees.

1 Defendants moved for partial judgment on the pleadings, arguing that under
2 Nevada law, employee non-compete agreements are not assignable as a matter of law unless
3 the employee consents. Defendants note the Complaint does not allege Bymoen consented
4 to the assignment of the Agreement to Hughes Supply or to HD Supply, and thus argue that
5 HD Supply cannot enforce the Agreement in Nevada, citing Traffic Control. Defendants
6 therefore argue HD Supply's claims for breach of contract and tortious interference with
7 contractual relations fail as a matter of law, and HD Supply also is not entitled to injunctive
8 relief as a matter of law.

9 Plaintiff HD Supply argues the rule of Traffic Control is limited to corporate
10 transactions in the form of asset purchases, in which the covenants are corporate assets that
11 must be transferred by assignment. HD Supply argues the rule does not apply in the context
12 of a merger, where the corporate assets are vested in the surviving corporate entity by
13 operation of law, without the need for an assignment. HD Supply also argues the rule of
14 Traffic Control is limited to non-competition covenants, and expressly does not apply to
15 covenants of non-solicitation or confidentiality.

16 The Court on its own motion concludes this matter is suitable for certification to
17 the Nevada Supreme Court, as explained in the Court's Order (Doc. #34) dated December
18 20, 2007. The matters before the Court include questions of Nevada state law that may be
19 determinative of HD Supply's claims for breach of contract and tortious interference with
20 contractual relations, and that may affect the scope of any injunctive relief to which HD
21 Supply may be entitled.

22 **II. NAMES OF THE PARTIES**

23 Plaintiff HD Supply Maintenance, LTD; and

24 Defendants Leif Bymoen and AZ Partsmaster, Inc.

25 **III. THE NAMES AND ADDRESSES OF COUNSEL FOR THE PARTIES**

26 FORD & HARRISON LLP

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3 LEWIS & ROCA LLP
4 Anthony L. Martin
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6 Counsel for Plaintiff

7 And

8 QUARLES & BRADY LLP
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Phoenix, Arizona 85004-2391

11 NEWMAN MORRIS & DACHELET, LTD.
12 David W. Dachelet
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13 300 S. Fourth Street
Las Vegas, Nevada 89101

14 Counsel for Defendants.

15 **IV. ANY OTHER MATTERS THE CERTIFYING COURT DEEMS RELEVANT**
16 **TO A DETERMINATION OF THE QUESTIONS CERTIFIED**

17 The parties were unable to agree to a form of certification, and specifically
18 disagreed over whether this Court should provide to the Nevada Supreme Court copies of
19 the documents embodying the mergers which resulted in HD Supply being Century's
20 successor in interest. The merger documents were not part of the record before this Court
21 on Defendants' motion for judgment on the pleadings. The Court defers to the Nevada
22 Supreme Court to decide whether it requires the merger documents, or any other evidence,
23 to answer the certified questions.

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1 **V. CONCLUSION**

2 Having complied with Nevada Rule of Appellate Procedure 5(c)'s provisions, the
3 Court hereby directs the Clerk of the Court to forward this Order and a copy of the Court's
4 Order of December 20, 2007 to the Supreme Court of the State of Nevada, 201 South
5 Carson Street, Carson City, Nevada 89701 under official seal.

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7 DATED: January 24, 2008

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10 PHILIP M. PRO
11 United States District Judge

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